

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
L.V., et al., : Docket #1:19-cv-05451-  
 : AT-KHP  
 :  
 Plaintiffs, :  
 :  
 - against - :  
 :  
 NEW YORK CITY DEPARTMENT OF : New York, New York  
 EDUCATION, : October 1, 2020  
 Defendant. :  
 : TELEPHONE CONFERENCE  
 ----- :

PROCEEDINGS BEFORE  
THE HONORABLE JUDGE KATHARINE H. PARKER,  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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INDEXE X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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PROCEEDINGS

3

THE CLERK: Calling case 19civil5451, the  
Honorable Katharine H. Parker, presiding.

Will counsel for the plaintiffs please state their  
name for the record.

MS. OROMA HOMA MPI-REYNOLDS: Good afternoon, your  
Honor. This is Oroma Mpi-Reynolds for plaintiffs, L.V. and  
J.V.2.

HONORABLE KATHARINE H. PARKER (THE COURT):  
Great. Nice to talk with you.

MS. MPI-REYNOLDS: Thank you.

MS. CAROLYN KRUK: Good afternoon. Carolyn Kruk  
with the New York City Law Department for the Department of  
Education, for defendants.

THE COURT: Okay. Hi, Ms. Kruk. How are you?

MS. KRUK: I'm well. Thank you. How are you, your  
Honor?

THE COURT: Okay. Thank you.

All right, thank you, both, for the submissions  
that you have provided me.

And, actually, before we get started -- I'm  
jumping into things -- I need to go through a few  
preliminaries. As you know, we are tape-recording this call  
so that you can order a transcript. The call is open to the  
press and public on a listen-only basis, and court rules

1 prohibit tape-recording and rebroadcasting of court  
2 proceedings; and a violation of this rule can result in  
3 sanctions. And I would ask you to keep your phones on mute  
4 when you're not speaking for the best reception, and to  
5 state your name before speaking for clarity of any  
6 transcript that's created.  
7

8 All right, you have submitted letters, both sides  
9 have submitted letters to the Court concerning discovery  
10 and concerning compliance with the injunctive relief that  
11 plaintiffs received, and also concerning the commencement  
12 of school this year. What I glean from the submissions  
13 about the status of services being provided to J.V.2 is  
14 that his mother, L.V., is impeding the process. We spoke  
15 months ago about getting the transportation that L.V. was  
16 insisting on. The Board of Education was willing to do  
17 that. And now L.V. wants something else. That's not okay.  
18 L.V. insisted on a -- she insisted on a program in  
19 Manhattan, a specific program. The Department of Education  
20 approved that program, got him in, and it wasn't provided.  
21 The Department of Education, with respect to transportation  
22 aide, the Department of Education was willing to go with  
23 the aide that L.V. said that she trusted or to provide a  
24 babysitter so that she could have alternate -- if that  
25 transportation aide wasn't available, either L.V. or her

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## PROCEEDINGS

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mother could travel with J.V.2 to the services. And now the Department of Education has arranged for services at a local school, which should be much easier to get to from Staten Island, and now I'm hearing that's not sufficient.

So these are real problems in cooperation with the process, Ms. Mpi-Reynolds. Why is L.V. raising all these obstacles to getting her son some services?

MS. MPI-REYNOLDS: Your Honor, from L.V.'s perspective, you know, she acknowledges that that travel aide she identified became unavailable apparently unbeknownst to her. But over the summer, after the Department of Education, I guess, ceased providing or offering the injunction services at the local public school, LV did, on her own, make arrangements to secure ABA therapy through the identified provider for J.V.2. She also began securing, I believe, occupational therapy for J.V.2. So she is not trying to at least -- her goal is not to impede her son getting the services, but she has expressed a desire to select the providers herself versus accepting the Department's arranged-for providers.

And with respect to the current arrangement that Ms. Kruk wrote about, the parent does not believe that the arrangement is in compliance with your Honor's Order in that it does not include a special education teacher at the

1 school in Manhattan in the Lower East Side; it doesn't  
2 include physical therapy; and the parent is also concerned  
3 that through her own investigation and speaking with the  
4 assistant principal at P.S. 20 and the IEP coordinator  
5 there, who's like a special education administrator, and  
6 also the classroom teacher, the kindergarten teacher, L.V.  
7 is adamant that the related services, the limited related  
8 services that the Department has arranged to take place  
9 there, the occupational therapy and speech therapy, would  
10 not be provided in person. So I understand Ms. Kruk has  
11 represented to me that it will be provided in person. L.V.  
12 is indicating to me that she's heard directly from these  
13 three individuals that the school that the model is at, the  
14 related services would be provided remotely within the  
15 classroom and that L.V. is concerned about how the  
16 kindergarten teacher would facilitate it when there are no  
17 providers actually present and that the services would be  
18 remotely, I guess, streamed in into the classroom and not  
19 in a separate location. So, your Honor, that is her  
20 perspective.

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22 THE COURT: Okay, well, she's being unreasonable  
23 because that's, from what I'm seeing, the Department of  
24 Education has gone through great lengths to try to set  
25 something up, and she is throwing roadblocks and changing

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2 her mind -- she's changed her mind multiple times. So this  
3 is, it's a problem. If you think that there is a motion for  
4 failure to comply, and you want to bring some kind of  
5 action, we can have a hearing on all of the evidence. I  
6 just don't understand why she's not having her son start,  
7 at least start, at least get some of these services and see  
8 how they go, and then at least he's getting partial  
9 services and partial schooling. But as I understand it,  
10 she's blocking everything. This is not good for her son. So  
11 it just, it doesn't make any sense what she's saying, and  
12 she's changed positions multiple times on a variety of  
13 things. So at this point, what is going on with the  
14 underlying administrative proceeding?

15 MS. MPI-REYNOLDS: Your Honor, I believe in terms  
16 of the administrative hearing, the hearing officer has  
17 ruled that he will hear the issue of the denial of FAPE,  
18 whether the Free Appropriate Public Education has been  
19 offered or provided, and that issues concerning pendency,  
20 enforcement or compliance with pendency would be heard by  
21 your Honor in this pending federal action. But in terms of  
22 the procedural posture at this time, I believe the  
23 Department is nearing the conclusion of its case in chief.  
24 And we have two hearing dates scheduled for October 23rd  
25 and October 26th. I believe one of those dates may be the

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## PROCEEDINGS

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beginning of the parents' case, but it's not certain yet, I believe. I'm waiting to hear from the Department's agency attorney by next Wednesday about whether the Department will be resting its case in the administrative hearing.

THE COURT: Okay, so at this point, do you want to make a formal application that the defendant hasn't provided or complied with the terms of the Court's order?

MS. MPI-REYNOLDS: No, I do not wish to do that at this time, your Honor.

THE COURT: Okay, now, secondly, the Department of Education brought up a discovery issue, and specifically, it is seeking certain information related to J.V.2's education and services. And as I understand it, L.V. is objecting to this; and, Ms. Mpi-Reynolds, you're saying that the law doesn't permit it?

MS. MPI-REYNOLDS: Your Honor, I believe from the research that I've found, that J.V.2's records are protected by the IDEA, and these particular records, which are not in the possession of the Department. They would, if they exist, be in the possession of private service providers. The parent's argument is that those records are not covered essentially by the provisions within FERPA that would allow disclosure to be compelled by a judicial

officer. FERPA has to do, as I understand it, with the release of records that are already within the Department of Education's possession and would require the parent to provide consent for that disclosure; and that the lack of consent of a parent can be superseded by a judicial officer within the context of FERPA. But the parent's argument is, with respect to these particular records, that if they exist are maintained by private entities; and to the extent that the records reflect special education services rendered by these private agencies to J.V.2, that FERPA in terms of that particular provision that would allow disclosure via court order does not apply, and rather, the IDEA, which appears to provide a high-end level of protection on the basis that these records concern a child with a disability and arguably more sensitive, confidential information, that I did not find in my review of the IDEA a similar provision that would allow a disclosure over the objection of the parent.

THE COURT: Okay, Ms. Kruk, I'd like to hear from you on this issue.

MS. KRUK: Your Honor, so plaintiffs are suing the Department of Education in federal court under the IDEA. And discovery is permitted under the IDEA. And to the extent that the parent is unwilling to consent to the

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## PROCEEDINGS

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release of this information, some of it may be covered by FERPA or some may not. The bottom line, the Department of Education would be prejudiced without gaining access to the information. It's somewhat framed for the plaintiffs to sue the Department of Education under the same law that it seeks protection and the ability to withhold relevant records in the context of litigation.

THE COURT: All right, well, I'm looking at 34 CFR §3622 right now. And as I read it, the -- information can be disclosed without parental consent to officials of participating agencies for purposes of meeting the requirements of the IDEA. And there's nothing that I've seen in the relevant law that would preclude discovery of relevant information when the dispute and suit is against the Department of Education that needs to defend itself. So I don't read the provision in the same way. And under 34 CFR §99.31(a)(1), which is the FERPA, it allows for disclosure, even without the consent of a parent, to school officials, including teachers, within the agency or institution for purposes of complying with the law. And here we're talking about a legitimate purpose for requesting the information, not only to defend itself in the lawsuit but also for ongoing compliance with the IDEA. So I don't read the rules in the same way that you do,

1 PROCEEDINGS 11

2 Ms. Mpi-Reynolds, and I'm going to require that these  
3 disclosures be made.

4 So, Ms. Kruk, I think that the -- I think what you  
5 could do is submit a proposed court order to the provider  
6 for the Court's review.

7 MS. KRUK: Thank you. Yes, I'll do so. I'll draft  
8 that Order, a Proposed Order for your Honor and submit that  
9 in the next few days.

10 THE COURT: Okay. The other thing I wanted to  
11 raise with both of you is that you've submitted a lot of  
12 things to me by email, and I don't think that that's the  
13 appropriate way to submit things to the Court unless it  
14 concerns settlement. And I do know that there's some  
15 overlap in what we've been talking about; but to the extent  
16 there are issues pertaining to discovery in the case, the  
17 discovery schedule or compliance with the injunctive  
18 relief, those things need to be filed on ECF. And, of  
19 course, you can request that documents be filed in  
20 accordance with the Court's procedures. So I want to make  
21 sure that you're filing things on ECF, okay?

22 MS. KRUK: Very well. I'll -- the Department of  
23 Education will submit a required motion to seal some of the  
24 information in the attached emails. Otherwise, I did draft  
25 the letters with filing them on the public docket in mind.

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PROCEEDINGS

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So I was going to check with your Honor in terms of how to proceed, but appreciate you raising the matter. Thank you.

THE COURT: Yes. You can file it -- there's a way now on ECF where it can be filed and marked under seal until there's a ruling.

MS. KRUK: Great.

THE COURT: And the website for the Court has directions about that, because it only recently changed. It's a more streamlined process now.

MS. KRUK: Wonderful. Thank you.

THE COURT: Okay?

MS. MPI-REYNOLDS: Thank you.

THE COURT: Where are you otherwise on discovery on the remaining claim of retaliation?

MS. KRUK: So, your Honor, on the retaliation claim, no Amended Complaint was filed yesterday. So one of the issues I wanted to address was identifying the defendant's time to answer. We have reached a settlement in principle on all monetary claims. And I have received updated, an updated demand from the plaintiffs that I'm reviewing. We're still quite far apart in terms of our respective beliefs on a reasonable hourly rate and the scope of that settlement in principle. But we're hopeful, I think, that that would be resolved.

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## PROCEEDINGS

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THE COURT: Does what you're talking about in terms of a resolution also cover the attorneys' fees, the interim attorney -- well, I guess all of the attorneys' fees issues that Ms. Mpi-Reynolds raised?

MS. KRUK: I will try to address them at the same time. Again, we're quite far apart in terms of our interpretation of what that should cover, but I'm in the process of submitting my request to the comptroller to request authority to resolve those distinct portions. And if we cannot resolve one or the other, then litigating it is certainly an option.

THE COURT: And I'm going to permit a motion for interim fees. And so what I'd like to suggest is that you either come to a resolution within the next month or -- I guess technically the motion has been filed -- I'll take a look at that.

What you --

MS. MPI-REYNOLDS: Your Honor, I did file it on August --

THE COURT: Yes, it's Document ECF 85. And so what I would ask is for the City to respond to that motion by November 6th, if you haven't worked out a resolution.

MS. KRUK: Very well. Thank you, your Honor.

THE COURT: And in terms of the -- since the

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## PROCEEDINGS

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settlement would be of the -- would settle the remainder of the case, what I'd like to do is give you all this month to hopefully resolve the remaining issues between yourselves. So I would ask that the Amended Complaint, if it's going to be filed, be filed on the 6th of November. And then the City will have until the 4th of December to answer it.

MS. KRUK: Very well. Plaintiff -- this is Carolyn with the -- counsel for the Law Department. Plaintiffs' counsel has represented that they do not intend to file an Amended Complaint. Perhaps we can address that during today's call?

THE COURT: Ms. Mpi-Reynolds, what's the -- yes, initially, at the outset of my assuming representation in this matter, I did have some discussions with Ms. Kruk about the parent's desire to include the older sibling of J.V.2, who's known as J.V. 1; the parent has since decided not to proceed in that manner. What my concern is at this time with respect to amending the Complaint, I'm not exactly clear from my opposing counsel whether she's intending to, you know, claim a reduction of fees based on all of the relief sought in the Complaint drafted by predecessor counsel, Laura Barbieri. I'm not sure if that's playing a role. And my intention is to kind of proceed claim by claim in that there is first the preliminary

1 injunction, which had been achieved; and the settlement  
2 with respect to monetary damages, including retaliation,  
3 which has been accepted. And so from my perspective, that  
4 the sole remaining issue following your Honor's Order or  
5 Report and Recommendation to Judge Torres, that the sole  
6 remaining issue in contention which the parent seeks to  
7 proceed on or settle, would prefer to settle, is the  
8 enforcement in compliance with the Pendency Order. So, in  
9 other words, I just wanted to hear the Court's perspective  
10 on whether it is necessary for me to spend the time in  
11 amending the Complaint just to narrow the issues to what is  
12 currently still in dispute or whether I can just for  
13 purposes of judicial economy leave the Complaint as written  
14 and just continue with the remainder of the case.

16 THE COURT: Well, you're not reasserting any  
17 claims that were dismissed without prejudice is what I'm  
18 hearing. It sounds like it may not be necessary to submit  
19 the Amended Complaint if the only issues remaining are the  
20 enforcement of the Pendency Order and the attorneys' fees  
21 piece.

22 MS. KRUK: Defendants agree.

23 MS. MPI-REYNOLDS: Thank you.

24 THE COURT: So what I think you should do is  
25 write to me on November -- so, actually, what I'll do is

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PROCEEDINGS

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I'll take those deadlines off, the November 6 and the  
December 4 deadline. So I'll remove those deadlines.

Okay, can you all provide me a status update in  
two weeks?

MS. KRUK: Yes, your Honor.

MS. MPI-REYNOLDS: Yes, your Honor.

THE COURT: Okay. All right. I have another  
conference. I think some people are dialing in for that.  
So I need to adjourn this conference. And I hope you  
continue to stay in good health.

MS. KRUK: Thank you, your Honor.

THE COURT: All right. Bye-bye.

MS. MPI-REYNOLDS: Bye-bye.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of L.V. et al v. New York City Department of Education, Docket #19-cv-05451-AT-KHP, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: October 22, 2020